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STATE OF WASHINGTON

COURT OF APPEALS  
DIVISION II

BY   
DEPUTY

OF THE STATE OF WASHINGTON

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ZONNEBLOEM, LLC, and MANDL HOLDINGS, LLC,

Respondents,

vs.

BLUE BAY HOLDINGS, LLC,

Appellant.

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APPELLANT BLUE BAY HOLDINGS, LLC'S  
AMENDED OPENING BRIEF

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## **I. INTRODUCTION**

Appellant Blue Bay Holdings, LLC (“Blue Bay”) owns a commercial property in Poulsbo along Front Street. The owners of Blue Bay are husband and wife Jim and Erika Cecil, who relocated to Poulsbo to run a business. When Blue Bay razed the original building and started construction of a new one, disputes surfaced with the owners of the properties that surround the Blue Bay property on three sides. Respondents Zonnebloem, LLC (“Zonnebloem”) and Mandl Holdings, LLC (“Mandl”) own these neighboring properties. The owners of these LLCs are members of the Sluys family, long-time owners of commercial property in downtown Poulsbo. The disputes resulted in a bench trial of multiple adverse possession and prescriptive easements claims. Blue Bay raises two main issues on appeal.

Blue Bay first appeals dismissal on summary judgment of its claim for money damages that accompanied its claim for a prescriptive easement for electrical power lines. After the subsequent trial, the Superior Court granted judgment to Blue Bay awarding it the prescriptive easement. But the Sluyses had caused considerable financial damage to Blue Bay by interfering with this easement and preventing Blue Bay from reconnecting the electrical lines after construction of its building. Prior to trial, the Superior Court summarily dismissed Blue Bay’s claim for money

damages for interference with the easement based on the erroneous legal conclusion that Washington law did not recognize the claim. This is wrong. This Court should reverse and remand so that Blue Bay can pursue its damages from the interference with its prescriptive easement rights.

Blue Bay also appeals judgment to Mandl on Mandl's claim of adverse possession of Area 3. The evidence at trial did not satisfy Mandl's burden to prove each necessary element as to the entire area. This Court should reverse the judgment and require the Superior Court to limit Mandl's title to only the conceded areas: the physical encroachment of Mandl's building and retaining wall.

## **II. ASSIGNMENTS OF ERROR**

1. The Superior Court erred as a matter of law when it granted summary judgment dismissing Blue Bay's claim for money damages that accompanied its prescriptive easement claim on the mistaken conclusion that Washington law does not recognize the claim, where evidence showed the Sluyses had unreasonably denied Blue Bay the right to reconnect electrical power lines across the Sluyses' lots after Blue Bay's construction was finished and forced Blue Bay to connect power through a different point of access at great expense.

2. The Superior Court erred as a matter of law in granting judgment to Mandl for adverse possession of Area 3 when the evidence failed to establish all elements of the claim and only the physical encroachments should have been awarded.

3. Findings 4.B, 4.C., 4.D, 4.E, and 4.F are not supported by substantial evidence as to all of Area 3.

### **III. ISSUES PERTAINING TO ASSIGNMENTS OF ERROR**

1. Did the Sluyses fail to meet their burden as the parties moving for summary judgment to provide legal authority to the Superior Court sufficient to support dismissal of Blue Bay's claim for money damages for interference with the prescriptive electrical easement? (Assignment of Error 1).

2. Should the Superior Court have allowed Blue Bay to try its claim for money damages arising from the Sluyses' undisputed actions that interfered with the prescriptive electrical easement because Washington law permits a party claiming a prescriptive easement to recover damages for interference with that easement? Does this remain true where the alleged interference was the Sluyses' refusal to execute with Puget Sound Energy an easement necessary to restore the electrical connection? (Assignment of Error 1).

3. Did Mandl fail to meet his evidentiary burden to prove each element of adverse possession sufficient to justify judgment as to all of Area 3, or was the showing only sufficient as to the two physical encroachments? (Assignment of Error 2).

4. Was there a lack of substantial evidence to support Findings 4.B, 4.D, 4.C, 4.E, and 4.F regarding the elements of adverse possession as to all of Area 3? (Assignment of Error 3).

### **IV. STATEMENT OF THE CASE**

Blue Bay's owners Jim and Erika Cecil loved the Poulsbo area, so they decided to move there in 2011 and start a pet store. VR 195-97. They rented space about eight to ten doors down from the current Blue Bay building. *Id.* They later decided to purchase the property that is subject to this dispute. VR 197-98. Unfortunately, disputes with their new neighbors the Sluyses resulted.

**A. Blue Bay Bought Prime Commercial Property in Downtown Poulsbo and Began Construction of a New Building.**

Blue Bay closed on the new property on Front Street in early summer of 2012. VR 199. Blue Bay demolished the existing building and built a new two-story building. VR 203-04, 208.

Blue Bay's neighbors on three sides are the Sluyses, long-time Poulsbo residents who ran a bakery and now manage their commercial properties. VR 35, 37, 340:21-25. In 2013 during construction, the Sluyses claimed portions of the Blue Bay property through adverse possession. VR 206-09; CP 3-14 (Amended Complaint). Marion Sluys and his wife Loretta Sluys have owned the Mandl building (to the south of the Blue Bay lot) since 1971. VR 35:19-24. They have owned the Zonnebloem property Lot 1 (to the north of the Blue Bay lot) since 2001, and the Zonnebloem parking lot (to the northeast of the Blue Bay lot) since 2002. VR 36. Marion and Loretta conveyed these two properties in 2005 to their son Dan Sluys, who holds them as Zonnebloem, LLC, with his partner Stephanie Richards. VR 37, 340:21-25.

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**B. Blue Bay’s Neighbors Denied Blue Bay the Right to Reconnect Electrical Power Across Their Properties, Forcing Blue Bay to Pursue an Alternate Connection at Great Expense.<sup>1</sup>**

For decades, power to Blue Bay’s building had been supplied by a power line that—in the Sluyses’ own words—attached “to a strike on the side of the Mandl building.” CP 43; CP 61 ¶ 16. *See also* CP 172 ¶¶ 19; CP 203 ¶ 13; CP 195 ¶ 3, CP 197 ¶ 14. As the Sluyses explained to the Superior Court in their summary judgment motion, the power line “went down the side of the Mandl building and then over to the Voodiez [i.e., Blue Bay]<sup>2</sup> building.” *Id.* Blue Bay disconnected the power when it demolished its building. *Id.* When it was time to reinstall the power to the new building, Puget Sound Energy (“PSE”) “required Mandl to sign an easement agreement with PSE,” “[b]ut Mandl and PSE could not agree [on] easement language.” *Id.* *See also* CP 61-62 at ¶ 19; CP 76 ¶ 3; CP 77 ¶ 8; CP 99-100; CP 137:13-21, 143:1-4 (Cecil testimony). Specifically, Mandl required a termination clause in the easement; PSE could not agree

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<sup>1</sup> The facts in Sections B and C are taken from the summary judgment materials because they are relevant to review of the summary judgment ruling. After trial of the prescriptive easement claim, the Superior Court entered material findings that reflect these same facts. *See* CP 462-64 at Findings 6A-I.

<sup>2</sup> Voodiez was a restaurant in the former Blue Bay building. CP 58 ¶ 3 (Marion Sluys testimony). References to the Voodiez building are references to the Blue Bay building, which remains in the same footprint. *See* VR 324-25.

to it, although PSE would agree to specify the purpose of the easement and limit it to the South 4 feet to “encumber the Sluys property the least amount possible and for a very limited and specific purpose.” *See* CP 96 at #5. *See also* CP 117 (draft easement).

Mandl acknowledged “PSE would not install the utilities without a written grant of easement from the Sluys.” CP 49:21-22. Mandl freely admits that “Blue Bay could not connect to power without the Sluys and PSE agreeing on an easement.” CP 50:1-2. Mandl asserted it had “no legal obligation” to execute an easement to PSE to facilitate reinstallation of electrical service, and therefore Blue Bay could not establish causation for damages. CP 49:13-14.

Mandl’s refusal to execute an easement with PSE required Blue Bay to install power through the front of the building. CP 153; CP 172 ¶ 20 (Cecil Testimony). Blue Bay incurred at least an additional \$50,000 in construction costs for this work. CP 172 ¶ 20 (“The total increase in costs caused by the Plaintiffs’ refusal to allow use of the historic route exceeds \$50,000.”).

**C. On Summary Judgment, the Trial Court Dismissed Blue Bay’s Claim for Damages for Interference with Its Prescriptive Easement for Electrical Power.**

Among Blue Bay’s counterclaims, Blue Bay alleged a prescriptive

easement for electrical power (CP 25-26 at ¶ 14.2, 14.4), and damages from the Sluyses' unreasonable interference with, and breach of, that alleged prescriptive easement. CP 27-28 at ¶¶ 15.2.1-15.2.5, ¶ 15.3.

In a wide-ranging summary judgment motion touching upon all claims, the Sluyses asserted the Superior Court should dismiss Blue Bay's claim for a prescriptive easement for electrical connection. CP 37-50 (Motion for Summary Judgment). The Sluyses failed to provide any legal authority but simply attempted to reverse the burden, stating, "[P]laintiffs are unaware of any Washington authority allowing damages for a breach of an unwritten prescriptive easement." CP 50. They also provided no authority in their Reply. CP 208-10. By the time of the hearing, the Sluyses had conceded all other issues and sought only dismissal of Blue Bay's claim for damages associated with that prescriptive easement. *See* CP 208-10 (Reply Brief).

The Sluyses argued at the hearing that even as owners of a servient estate, they had no obligation to serve the purposes of the easement if it required signing anything to allow work to proceed. VR 7. They characterized their argument as one asserting lack of causation, arguing that the damages arise from the failure to execute a document, which the owner of a servient estate has absolutely no obligation to perform. VR 8.

Blue Bay argued that the law required the Sluyses to cooperate to

meet the purposes of the easement, i.e., to cooperate to allow PSE to restore the power, and that failure to do so constituted unreasonable interference that was cause for money damages. VR 9-12. The Sluyses' refusal to cooperate forced Blue Bay to mitigate its damages by pursuing power from Front Street. VR 10. The record demonstrated damages as a result of the inability to reconnect the electrical power. CP 143:13-25 (Cecil testimony submitted by the Sluyses); CP 172 ¶ 20 (Cecil testimony submitted by Blue Bay). Blue Bay argued that damages were available as a remedy for the Sluyses' alleged interference. VR 12; CP 162:15-163:6.

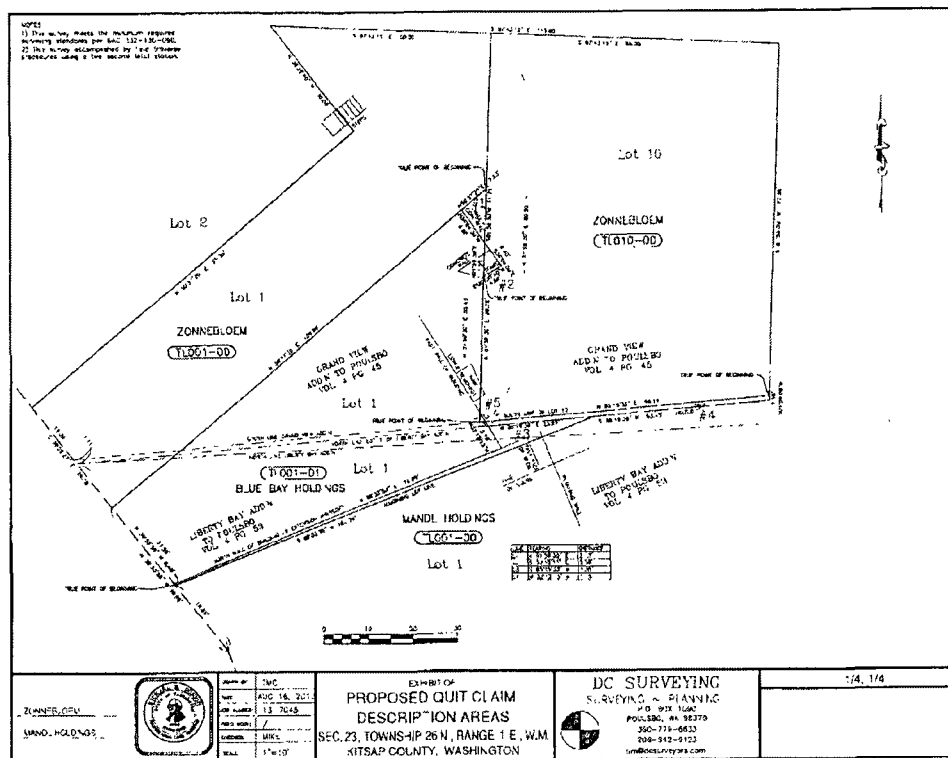
The Superior Court denied the global summary judgment motion, but dismissed the money damages claim. CP 211-12 ("Defendant's sixth cause of action; Breach of a Prescriptive Easement is dismissed.").

**D. After a Bench Trial, the Superior Court Awarded Blue Bay the Prescriptive Easement and Awarded Mandl Title to All of Area 3 Based on Adverse Possession.**

Multiple claims were tried. Relevant here, the Superior Court found for Blue Bay on its prescriptive easement claim for the electrical power connection. CP 462-63 at FF 6.A-G; CP 467 at Conclusion 8; CP 473 at 4 (Judgment). These findings reiterate the record from the summary judgment hearing regarding the Sluyses' refusal to cooperate to execute the PSE easement. *Id.* The Superior Court also quieted title to all of Area 3

in Mandl based on adverse possession. CP 461 at FF 4.A-F; CP 466 at Conclusion 4:20-23; CP 473 at 3 (Judgment). *See* Exhibits 46, 47 and 52 (displaying the triangular Area #3); VR 254:19-256:9 (re: Exhibits 46 and 47), VR 265:6-268:12 (re: Exhibit 52).<sup>3</sup>

This survey (CP 176) shows the Blue Bay parcel encircled by the Sluyses' properties, including the triangle that is Area 3 to the south of Zonnebloem Lot 10 and north of the corner of the Mandl building:



<sup>3</sup> In addition, Jim Cecil's testimony concerning Exhibit 40 describes Area 3 in relation to the power pole placed in Area 3 by his contractor. VR 209:17-210:25. Jim Cecil's testimony concerning Exhibit 41 provides a bird's eye view of Area 3. VR 239-40.

Substantial evidence supports an award of only the encroachments of the Mandl Building and the retaining wall (which Blue Bay had conceded).<sup>4</sup> The location of the pathway or “ramp” that had historically extended directly off the roof of the Mandl building has not been established. The Superior Court referred to Exhibits 16, 17 and 54 when addressing this evidence, but these newer photographs do not locate or help identify the area where the ramp extended off the roof. *See* CP 461 at FF 4.C<sup>5</sup>. No photos exist of the historical ramp, which was described only through approximated testimony.<sup>6</sup> Marion Sluys testified he had no photos that illustrate the former location of the rubber mats on the roof of the Mandl building associated with the former pathway or of the plum tree. VR 110. Further, no testimony addressed in any respect the main portions of the triangle, or the leg of the triangle that lies adjacent to Blue Bay’s east wall.

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<sup>4</sup> CP 461 at FF 4.E (reflecting concession); VR 88:13-89:24 (Marion Sluys testimony regarding encroachments).

<sup>5</sup> Finding 4.C reads: “In its former configuration a pathway existed from the roof of the Mandl Building to the Parking Lot. This pathway consisted of a footbridge and was in Area #3. It went next to the garage on the Mandl property. The bridge and pathway were maintained by Mandl and its predecessors in excess of ten years. This area is show in Exhibits 16, 17 and 54. A portion of the Mandl’s new HVAC system is in this area.”

<sup>6</sup> *See also, e.g.*, VR 113 (Mattson testimony that Exhibits 5B and 16 do not show historical pathway). The Court should be aware that multiple photographs relied upon by the witnesses to explain the historical pathway show a new ramp from the Mandl building and a new HVAC system.

The majority of Area 3 since at least 2002 is a steep, undeveloped hillside unused by any party and not significantly or consistently maintained by either party. The Sluyses submitted testimony of occasional maintenance, but so did Blue Bay. Blue Bay's predecessor Mr. Soltero testified that from 2002 to 2005, he trimmed and maintained the vegetation that grew in Area 3. CP 196 ¶¶ 10-12; *see also* Ex. 64. (Soltero testimony); VR 330-31 (admission of Soltero testimony).

Excluding the conceded physical encroachments, the award to the Sluyses of Area 3, which is directly behind and adjacent to the Blue Bay property, is not justified by the findings or the evidence.

#### **V. ARGUMENT**

Blue Bay should prevail because the damages claim was prematurely dismissed based on a mistake of law despite the uncontested evidence. The law allows a party asserting a prescriptive easement to seek the remedy of damages for interference with that easement. The Sluyses could not escape this theory of liability based on their lack of causation argument, which was unsupported and contrary to law. A triable issue was presented. This claim should be remanded for trial. Additionally, this Court should reverse the award of Area 3 to Mandl. Mandl had a steep burden that it did not meet, save for the small encroachments.

**A.     Standards of Review.**

This Court reviews *de novo* the summary judgment dismissal of the claim for money damages from the Sluyses' interference with the prescriptive easement. *See Folsom v. Burger King*, 135 Wn.2d 658 (1998) (summary judgment orders are reviewed *de novo*). Here—upon the presentation of absolutely no authority in their motion (*see* CP 49-50)—the Sluyses achieved dismissal of Blue Bay's claim for money damages for interference with a prescriptive easement. The Sluyses did not meet their moving burden. “In analyzing orders on summary judgment, this court has traditionally noted that **a moving party under CR 56 bears the initial burden of demonstrating** an absence of any genuine issue of material fact **and an entitlement to judgment as a matter of law.**” *Schaaf v. Highfield*, 127 Wn.2d 17, 21 (1995) (emphasis added). Here, the Sluyses offered no legal briefing to demonstrate that the law would not recognize Blue Bay's claim. This alone is sufficient to reverse. Further, the law supports the claim.

On summary judgment, a court “must consider the facts submitted and all reasonable inferences from the facts in the light most favorable to the nonmoving party.” *Wilson v. Steinbach*, 98 Wn.2d 434, 437 (1982). “The motion should be granted only if, from all the evidence, reasonable persons could reach but one conclusion.” *Id.* At a minimum

Blue Bay's evidence presented a question of fact whether the Sluyses unreasonably interfered with Blue Bay's prescriptive easement.

Adverse possession is a mixed question of law and fact. *Chaplin v. Sanders*, 100 Wn.2d 853, 863 (1984). "Whether the essential facts exist is for the trier of fact; but whether the facts, as found, constitute adverse possession is for the court to determine as a matter of law." *Id.* at 863. Appellate courts review the determination of adverse possession *de novo*. *Bryant v. Palmer Coking Coal Co.*, 86 Wn. App. 204, 210 (1997). Where the Superior Court made findings of fact after a bench trial, the appellate court reviews to see if those factual findings are supported by "substantial evidence." *Ridgeview Properties v. Starbuck*, 96 Wn.2d 716, 719 (1982) "Substantial evidence is a quantum of evidence sufficient to persuade a rational and fair-minded person that the premise is true." *Wenatchee Sportsmen Ass'n v. Chelan County*, 141 Wn.2d 169, 176 (2000).

In applying these standards, this Court should reverse.

**B. Dismissal of Blue Bay's Claim for Damages Was Legal Error Because Washington Law Allows a Claim for Damages for Interference with a Prescriptive Easement.**

The Superior Court erred when it dismissed Blue Bay's claim for damages for interference with Blue Bay's prescriptive easement for electrical connection across Mandl's and Zonnebloem's properties. Blue

Bay had alleged both the right to the easement and the right to damages from unreasonable interference. CP 25-26 ¶ 14.2, 14.4; CP 27-28 ¶¶ 15.2.1-15.2.5, ¶ 15.3. In general, the owner of any property interest, including interests less than a fee interest such as an easement, can bring a claim for damages that concerns the property. *Affiliated FM Ins. Co. v. LTK Consulting Services, Inc.*, 170 Wn.2d 442, 458 (2010). A trial court has discretion in light of the equities and the circumstances to recognize the servitude *and* provide a remedy that may include damages, as shown below. By refusing to execute an easement to PSE to serve the limited purpose of the easement, the Sluyses interfered with it, resulting in compensable damages. At the least, a trier of fact should have determined the interference issue. The dismissal of the claim for damages was reversible error.

1. The Sluyses failed to meet their moving burden when they provided the Superior Court no authority to support dismissal.

Dismissal of Blue Bay's claim was precipitous and unsupported by legal authority. The Sluyses offered no authority or analysis in their motion for the dismissal. CP 37-50, 208-10. They offered no case law or treatise showing that interference with a prescriptive easement does not support a damages claim or could not be shown if a servient estate holder refused to take steps to allow third parties to access the property to meet

the purposes of the easement. *Id.* The Sluyses pitched their argument as one of lack of “causation,” but they also offered no authority on causation. This should not have been sufficient to put the burden on Blue Bay to defend its legal theory. The dearth of authority offered by the Sluyses demonstrates that summary judgment was not warranted. *See Schaaf v. Highfield, supra*, 127 Wn.2d at 21 (moving party has burden to present legal authority).

2. Washington law recognizes a claim for damages from interference with a prescriptive easement, making dismissal of the claim legal error.

Washington law recognizes a claim for damages from interference with a prescriptive easement. To establish a prescriptive easement in Washington, the dominant estate holder (Blue Bay) must show the classic elements of adverse possession: open, notorious, uninterrupted use over a uniform route that was adverse to the landowner and at a time when he could enforce his rights. *Gamboa v. Clark*, 183 Wn.2d 38, 43-44 (2014). Ultimately, Blue Bay succeeded at trial and the Superior Court entered judgment in favor of Blue Bay on the prescriptive easement claim.<sup>7</sup> But

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<sup>7</sup> In reaching this judgment, Judge Olsen found that PSE required a written easement to reconnect the power, that Mandl “was unwilling to grant the easement unless it had a termination clause,” and that PSE could not agree to a termination clause. Finding 6.D. The Court further found, “Ultimately, Blue Bay had no option except to have power installed along

the Superior Court already had mistakenly dismissed the claim for damages arising from the Sluyses' refusal to allow reconnection of the electric service. Blue Bay should have been permitted to seek an award of damages as a remedy.

Regarding remedy, the Court of Appeals in *Bauman v. Turpen* expressly followed the Restatement (Third) Property: Servitudes § 8.3(1) *Availability and Selection of Remedies for Enforcement of Servitude* (2000), which provides that “[a] servitude may be enforced by any appropriate remedy or combination of remedies, which may include declaratory judgment, compensatory damages, punitive damages, nominal damages, injunctions, restitution, and imposition of liens.” (emphasis added). 139 Wn. App. 78, 92 (2007), citing Rest. (3d) Property: Servitudes § 8.3(1) (2000). Comments to this Restatement instruct that “[j]udges have wide discretion in selecting remedies to provide full and appropriate relief to an injured party.” Rest. (3d) Property: Servitudes § 8.3 Cmnt. b. The Washington State Supreme Court similarly has stated that trial courts sitting in equity can fashion “broad remedies to do substantial justice to the parties....” *Esmieu v. Hsieh*, 92 Wn.2d 530, 535 (1979). These decisions show that Superior Courts have authority not just to recognize a

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Front Street.” Finding 6.E. The Court then recognized the prescriptive easement across the historical route with minor alterations. Finding 6.G.

prescriptive easement, but also to award damages to compensate for interference with it. The Superior Court's dismissal conflicts with *Bauman v. Turpen*, *Esmieu v. Hsieh* and Restatement (3d) Property: Servitudes § 8.3(1).

Washington courts generally follow the Restatement (Third) Property: Servitudes, as shown in *Bauman*. Additionally, the Court of Appeals in 2004 adopted the general definitions of servitudes contained in this Restatement. *Lake Limerick Country Club v. Hunt Mfg. Homes, Inc.*, 120 Wn. App. 246, 253 (2004), citing Rest. (3d) of Property: Servitudes § 1.1 and § 1.3 (2000). Washington courts, therefore, would be expected to apply Restatement (Third) Property: Servitudes §§ 4.9 and 4.10, which are consistent with the general approach to equity of Washington's jurisprudence. These sections strongly support reversal.

Restatement (Third) Property: Servitudes §§ 4.9 and 4.10 establish that servient owners (like the Sluyses) are only entitled to make use of the servient estate that "does not unreasonably interfere with the enjoyment of the servitude," and that the respective rights and privileges must be exercised "in a spirit of mutual accommodation." Comment (c) to § 4.9 states that "[t]he owner of the servient estate is not entitled to interfere unreasonably with the legitimate enjoyment of the servitude." These principles are firmly entrenched in Washington law. *See Thompson v.*

*Smith*, 59 Wn.2d 397, 407-08 (1962) (a servient estate owner may use his property in any reasonable manner that does not interfere with the original purpose of the easement); *Littlefair v. Schulze*, 169 Wn. App. 659 (2012) (same). Here, the Sluyses could not simply frustrate Blue Bay's rights by refusing to accommodate PSE.

*Crisp v. VanLaeken*, 130 Wn. App. 320 (2005), further provides strong support to Blue Bay as the dominant estate holder. In *Crisp*, Division II rejected *Restatement (Third) of Property: Servitudes* § 4.8(3) (2000). 130 Wn. App. at 321. Section 4.8(3) contains a "minority view" that permits a servient estate owner to relocate an easement. *Id.* at 323-324. The Court of Appeals views this minority rule as inconsistent with Washington law and its policies to promote "uniformity, stability, predictability and property rights." *Id.* at 325. This Court's rejection of § 4.8(3) favors the rights of dominant estate holders (like Blue Bay) over servient estate holders (like the Sluyses). Washington has long provided strong protection for the rights of dominant estate holders. *Id.* The Sluyses sought to frustrate these rights by their actions.

Washington courts also recognize that "the law disfavors termination of easements." *Littlefair*, 169 Wn. App. at 666. Termination usually requires the servient owner to demonstrate adverse possession of the easement. *Id.*, citing *City of Edmonds v. Williams*, 54 Wn. App. 632,

634, 636 (1989). *See also Northwest Cities Gas Co. v. W. Fuel Co.*, 13 Wn.2d 75, 88 (1942) (“A prescriptive right, once acquired, cannot be terminated or abridged at the will of the owner of the servient estate.”). Contrary to these principles, the Sluyses take the position that the prescriptive easement is as good as useless because they can refuse to cooperate with PSE to restore the power connection, effectively terminating it. This is inconsistent with Washington law. Additionally, the Sluyses assert they were “unable” to reach agreement with PSE because the Sluyses insisted on a termination clause in PSE’s proposed easement. But the Sluyses had no right to terminate Blue Bay’s prescriptive easement, and therefore no right to require a termination clause with PSE.

Restatement (Third) Property: Servitudes § 4.1 *Interpretation of Servitudes* (2000) instructs that because servitudes are “widely used in modern development and ordinarily play a valuable role in utilization of land resources,” a servitude should be interpreted to give effect to the “circumstances surrounding creation of the servitude” and “to carry out the purpose for which it was created.” The Washington State Supreme Court has analyzed the rights of the servient owner exactly this way, stating that a servient owner has “only such use...as does not materially interfere” with the dominant owner’s rights, and that an act that “unreasonably interferes” with those rights is forbidden. *See Seattle v.*

*Nazarenius*, 60 Wn.2d 657, 666-67 (1962) (owner of servient estate is divested of use that is inconsistent with use of easement). Here, the Sluyses were required to accommodate PSE's requests to accomplish the purpose of the easement. By refusing to sign the easement to allow PSE to reconnect the power, the Sluyses interfered with Blue Bay's rights and are subject to the claim for damages.

The dismissal was legal error based on these authorities including *Bauman v. Turpen*, *Thompson v. Smith*, *Littlefair v. Schulze*, *Crisp v. VanLaeken*, *City of Edmonds v. Williams*, *Northwest Cities Gas Co. v. W. Fuel Co.*, and *Seattle v. Nazarenius*, and the Restatements discussed above.

Courts outside Washington award damages for interference with an easement. *See, e.g., Fyfe v. Tabor*, 860 N.W.2d 415 (Neb. 2015) (affirming recognition of prescriptive easement and award of damages from interference); *Dolnikov v. Ekizian*, 222 Cal. App 4<sup>th</sup> 419 (2013) (affirming award of damages for unreasonable interference with a roadway easement based on a refusal by the servient estate owner to sign off on the City's work permit). *Dolnikov* is especially compelling because the facts are highly analogous. The servient owners refused to sign documents necessary for the dominant owner of a driveway easement to grade and install a retaining wall. *Id.* at 424-25 ("In the absence of defendants' signatures, LADBS issued a stop-work order in June 2004 and

revoked plaintiff's permits in late July 2004, bringing to a halt work on the driveway that provided access to the houses."); 426 (same concerning LADBS refusal to conduct final inspection because of defendants' refusal to sign off on permit). A jury held that these refusals constituted unreasonable interference with the easement. *Id.* at 426. The appellate court agreed, stating, "Ekizian's refusals to sign [the building permit and covenant] constituted an unreasonable interference with plaintiff's use and enjoyment of the easement." *Id.* at 430. The appellate court further reasoned that the interference cannot be permitted because it essentially seeks to terminate the dominant owner's rights, as follows:

By declining simply to provide a signature on two documents required by the city, defendants interfered with plaintiff's ability to maintain and repair the easement, and rendered plaintiff's use of the easement, not simply more difficult, but impossible. In this manner, defendants' action of refusing to cooperate or reasonably accommodate constituted a complete and total obstruction of plaintiff's easement.

*Id.* at 431. *Dolnikov* further shows that the Sluyses' position that they could not be required to execute a document to achieve reconnection of the electrical power is wrong. This Court should follow the reasoning and result in *Dolnikov*, which is consistent with Washington law.

This Court should be persuaded that monetary relief is a legitimate and available remedy to accompany a claim to enforce or establish a prescriptive easement. A trial court may both recognize the servitude *and*

provide the remedy of monetary damages. Blue Bay's legal theory is proper, and this Court should hold as a matter of law that the claim was sufficiently supported to go to trial. By refusing to execute the easement with PSE to restore electrical connection, the Sluyses frustrated the purpose of the easement. They essentially sought to unilaterally terminate it. This was not reasonable as a matter of law.

At the very least, this Court should hold that the claim should go forward and whether the Sluyses' refusals to execute the PSE easement were reasonable should be determined as a question of fact. "Given that reasonableness depends on the facts and circumstances of each case, '[w]hether a particular use of the land by the servient owner ... is an unreasonable interference is a question of fact....'" *Dolnikov*, 222 Cal. Ap. 4<sup>th</sup> at 430. Blue Bay is entitled to trial of its claim for damages.

**C. The Award to Mandl of All of Area 3 by Adverse Possession Is Unsupported by Findings or Substantial Evidence.**

This Court should reverse and direct the Superior Court to revise the Judgment regarding Area 3. The Superior Court erroneously lumped all of Area 3 into its adverse possession holding when the Sluyses only met their burden as to a small portion. The findings and evidence only support award of the physical encroachments. The Superior Court should not have awarded the majority of the triangle that lies behind and adjacent

to Blue Bay's building.

To prove an adverse possession claim requires a preponderance of evidence sufficient to show possession of property for ten years that is “(1) exclusive, (2) actual and uninterrupted, (3) open and notorious, and (4) hostile and under a claim of right made in good faith.” *Chaplin v. Sanders*, *supra*, 100 Wn.2d at 857; RCW 4.16.020; *Teel v. Stading*, 155 Wn. App. 390 394 n. 3 (2010) (burden is a preponderance). Blue Bay does not appeal the adverse possession holding as to the physical encroachments of the Mandl building and retaining wall. As to all other parts of Area 3, no findings (apart from conclusory ones) or testimony establish actual, open and notorious, hostile, continuous or exclusive possession of other portions. Substantial evidence does not support Findings 4.B, 4.C, 4.D, 4.E, and 4.F. These findings are inexact and over-inclusive.

For example, the Superior Court made the over-inclusive statement that “Area 3” had been “used and maintained by the Sluys for a long time,” “including the removal of a plum tree.” CP 461 (Finding 4.B<sup>8</sup>). Finding use for “a long time” is not sufficient to show uninterrupted use for ten years. Further, the removal of a singular plum tree from the tip of the triangle was an isolated act of maintenance, and concerned only the tip

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<sup>8</sup> Finding 4.B reads: “The evidence showed that Area #3 had been used and maintained by the Sluys for a long time. Mandl maintained it—including the removal of a plum tree.”

of the parcel. These findings do not establish uninterrupted or continuous use and maintenance of Area 3. Neither did the underlying testimony.

1. Marion Sluys's testimony regarding Area 3.

Marion Sluys testified that, apart from the historical path, Area 3 was historically "just weeds and blackberries" and that he would "occasionally take care of" it to "get on to the roof... of my building." VR 61:13-16. He testified that he removed a plum tree from the tip of Area 3. VR 69:20-70:7; VR 109:15-110:6. He testified that the top of the triangle was "a grassy area," the extension of a hill that started in the Zonnebloem parking lot and went "down over the edge" into the triangular area. VR 62-63. He testified vaguely about the former pathway. VR 67-69, 84:13-22, 108:19-109:13.

2. Daniel Sluys's testimony regarding Area 3.

Daniel Sluys testified that he acquired an ownership interest from his parents in the Zonnebloem building and parking lot in 2005, but has been familiar with the properties since 2001. VR 157-58. He testified he did not give the property behind the Mandl building and the pathway "a whole lot of notice." VR 177:2-5. He did not personally maintain the bank area, and was generally familiar that his parents had hired Kristin Reed to occasionally maintain their properties; he personally observed only "on occasion" Ms. Reed doing maintenance work, primarily in the summers.

VR 188:19-191:20-21.

3. Tammy Mattson's testimony regarding Area 3.

Tammy Mattson has been a tenant of Marion Sluys since 2005; she runs a restaurant in the Mandl building. VR 111-12. She testified very approximately about the historical pathway. VR 113-15. She testified that the portion of Area 3 to the west of the historical pathway was "uncared-for landscaping" consisting of "weeds or general native foliage." VR 114:17-115. She testified that a man and woman hired by Marion Sluys would weed-whack these bank areas in Area 3 every summer, but the areas touched were inconsistent. VR 116-17 ("It would kind of vary year by year as to how far it would go into that area."). She vaguely testified she located four and then three rosemary bushes in the "flat area right at the top" toward the parking area. VR 121:12-122:5.

4. Ricky Moon's testimony regarding Area 3.

Ricky Moon, a contractor for Marion and Dan Sluys, testified also that Area 3 was mostly "overgrown blackberry bushes" when he first started working for the Sluyses in 2003. VR 127:9-12 (addressing Exhibit 51). A few times a year Mr. Moon would clean gutters on the Mandl property and keep the blackberry bushes away from the buildings. VR 127:17-22. He did this when the blackberries got "out of hand and would start growing over the [Mandl] roof and the ramp area." VR 141:2-6. He

had no knowledge of the property lines. VR 137:18-138:7.

He also testified about the former pathway that extended from the roof to the dirt leading to the vacant Zonnebloem lot. VR 127:22-130:6. He stated that the black matts that provided a path across the Mandl building roof were located to the left of the old HVAC unit shown in Exhibit 16, which is three to four feet from the edge of the Mandl building. VR 134:18-25. Mr. Moon “indicated” frequently in his testimony, giving testimony that was not preserved because the exhibits were not marked to show what he indicated.

Mr. Moon also testified he was not concerned when he installed a new HVAC system for the Mandl building in Area 3 despite the dispute over title and the City’s refusal to approve a building permit. VR 143:12-21. He said he was not concerned because the HVAC system could always be moved. *Id.*

The Superior Court did not mention in its Findings and Conclusion witness Kristin Reed, who performed summer weeding on all the Mandl and Zonnebloem lots, occasionally and inconsistently in Area 3. VR 145-48, 151.

The Superior Court incorrectly observed that Blue Bay did not “rebut” the testimony of Marion Sluys, Daniel Sluys, Tammy Mattson and Ricky Moon that “the area” was “used exclusively by Mandl for over ten

years.” CP 461 at FF 4.D. This is an unsupported characterization of their testimony, which contained nothing to rebut. Their testimony did not concern the entire area or rise to the level necessary for adverse possession. It was approximate and inexact. Their testimony failed to identify the particular parts of Area 3 that allegedly were “used” even sporadically.

Contrary to the conclusory finding of the Superior Court, the testimony of these witnesses did not establish continuous, or uninterrupted, use of all of Area 3. The evidence also did not demonstrate exclusive use. Predecessors using the Blue Bay parcel performed maintenance of a similar character at the same time as the occasional maintenance by agents of Mandl. *See* CP 196 ¶¶ 10-12; *see also* Ex. 64. (Soltero testimony); VR 330-31 (admission of Soltero testimony). The Supreme Court has observed that shared use of property is “not possession in the nature one would expect from an owner, and thus the exclusivity requirement [is] not been met.” *ITT Rayonier v. Bell* 112 Wn.2d 754, 758 (1989). “Exclusive dominion over land is the essence of possession, and it can exist in unused land if others have been excluded therefrom.” *Id.* The Supreme Court noted that “[a] fence is the usual means relied upon to exclude strangers and establish the dominion and control characteristic of ownership.” *Id.* In this case, no fence or other evidence of exclusivity

exists. All parties largely ignored the undeveloped area and trimmed back the blackberries from time to time.

Even the testimony about the historical ramp was too approximate to locate the area it supposedly covered. For example, Mr. Moon testified that black mats were placed on the Mandl roof several feet to the east of the edge of the Mandl building alongside the *old* HVAC equipment. VR 134:18-25. He testified a wooden ramp continued that path from the edge of the roof toward what had been the unpaved parking lot. *Id.* At the most, one imagines this ramp could have crossed only the tip of Area 3, but even this assumption is not supported by the record. Evidence that the historical ramp extended over the tip of the triangle was insufficiently definite to locate the area. This shortcoming in the evidence should not have been “solved” by simply awarding all of Area 3 to Mandl, including the majority of the triangle where no ramp had ever existed. Rather, the claim failed.

Mandl appeared to benefit from a misguided presumption that the entire Area 3 would either vest in Mandl or in Blue Bay, rather than examining *what portion* of Area 3 the testimony addressed. Mandl’s case failed as to a substantial portion of Area 3. The majority of the triangle and its leg that is adjacent to the Blue Bay building should remain on Blue Bay’s title.

One purpose of adverse possession is “assuring the maximum utilization of land.” *Chaplin*, 100 Wn.2d at 860. This policy is not served by the award. The Sluyses used Area 3 no more than Blue Bay’s predecessors. It was undeveloped and largely ignored. Both the Mandl and Blue Bay parcel benefitted when the blackberries were trimmed back, which both parties did occasionally. Inconsistent trimming by Mandl was not the hallmark of an owner’s use, but of an adjacent owner’s use. Blue Bay’s predecessors behaved like true owners and cannot have been expected to notice or object to the occasional maintenance by agents of the Sluyses. The burden of proof favors the record title holder, Blue Bay.

Apart from the Mandl building encroachment and retaining wall, the Sluyses did not meet their burden to become the record title holder of Area 3.

**D. Request for Attorney Fees.**

If Blue Bay succeeds on appeal, this Court may award Blue Bay its attorney fees and costs pursuant to RAP 18.1 and RCW 7.28.083. The statute gives the court “in an action asserting title to real property by adverse possession” discretion to award any portion of costs or attorney fees to “the prevailing party” that the court deems “equitable and just,” as follows:

The prevailing party in an action asserting title to real property by

adverse possession may request the court to award costs and reasonable attorneys' fees. The court may award all or a portion of costs and reasonable attorneys' fees to the prevailing party if, after considering all the facts, the court determines such an award is equitable and just.

RCW 7.28.083(3). This statute permits a fee award as to both issues raised by Blue Bay where the doctrines of adverse possession and prescriptive use "are often treated as equivalent[s]" and require the identical elements. *Kunkel v. Fisher*, 106 Wn. App. 599, 602-03 (2001). The Court of Appeals has held that this statute applies to prescriptive easement claims based on the correct observation that prescriptive easement claims are equivalent to adverse possession claims. *Erbeck v. Springer*, 2015 Wash. App. LEXIS 3040 \*13, \*22-23 (2015) (Cox, J.) ("Easement rights can be obtained by adverse use, also known as prescription.".)<sup>9</sup>

The trial established that Blue Bay rightfully claimed a prescriptive easement. The Superior Court prematurely and wrongfully denied Blue Bay its associated claim for damages. The Superior Court also did not hold Mandl to its burden of proof with regard to adverse possession of Area 3. Blue Bay did not initiate this litigation but has been burdened with it to vindicate its rights and stand up to the Sluyses who, surrounding Blue Bay on three sides, coordinated to obstruct Blue Bay's development. In

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<sup>9</sup> This unpublished case is cited as nonbinding authority pursuant to GR 14.1.

these circumstances, the Court should award fees and costs to Blue Bay if it prevails.


## **VI. CONCLUSION**

Without legal authority, the Superior Court summarily dismissed Blue Bay's claim for damages for interference with its prescriptive easement. This Court should hold that the claim is valid. Blue Bay should have been permitted to proceed to trial on the claim. This Court should reverse and remand the claim.

This Court also should reverse the judgment to Mandl of all of Area 3 for lack of substantial evidence. Mandl did not meet its burden of proof to establish all elements of adverse possession as to Area 3. This Court should direct the Superior Court to reduce the land vested in Mandl, awarding only the physical encroachments of the Mandl building and retaining wall that Blue Bay conceded at trial.

Dated: December 1, 2016.

SCHWABE, WILLIAMSON & WYATT, P.C.

By:   
Averil Rothrock, WSBA #24248  
Milton A. Reimers, WSBA #39390  
*Attorneys for Appellant, Blue Bay  
Holdings, LLC*

# **APPENDIX - A**

FILED  
KITSAP COUNTY CLERK  
2015 MAY 20 PM 3:56  
DAVID W. PETERSON

IN THE SUPERIOR COURT OF THE STATE OF WASHINGTON  
IN AND FOR KITSAP COUNTY

ZONNEBLOEM, LLC, a Washington limited  
liability company, MANDL HOLDINGS, LLC,  
a Washington limited liability company,

Plaintiffs,

v.

BLUE BAY HOLDINGS, LLC, a Washington  
limited liability company,

Defendant.

NO. 13 2 02207 1

ORDER GRANTING PLAINTIFFS'  
MOTION FOR SUMMARY  
JUDGMENT IN PART

This matter came before the Court on plaintiffs' motion for a summary judgment.  
The Court heard oral argument of counsel for plaintiff. The Court considered the  
following pleadings:

1. Plaintiff's Motion for Summary Judgment;
2. Declaration of Marion Sluys in Support of Motion for Summary Judgment;
3. Declaration of Daniel Sluys in Support of Motion for Summary Judgment;
4. Declaration of David P. Horton in Support of Motion for Summary Judgment;
5. Blue Bay Holdings LLC's Opposition to Motion for Summary Judgment;
6. Declaration of Jim Cecil in Opposition to Motion for Summary Judgment;
7. Declaration of Roberto Soltero;

ORDER -1

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8. Declaration of Rick Waltenburg;
9. Plaintiffs' Reply in Support of Motion for Summary Judgment;
10. \_\_\_\_\_

Based on the argument of counsel and the evidence presented, and the concession by the plaintiffs the Court finds there are no questions of material fact with respect to defendant's Sixth Cause of Action, Breach of Prescriptive Easement and plaintiffs are entitled to judgment as a matter of law; and the remainder of the relief requested by plaintiffs should not be granted.

Accordingly, it is ORDERED:

1. Defendant's sixth cause of action; Breach of a Prescriptive Easement is dismissed; and
2. The remainder of plaintiffs' requests for relief are denied.

DATED this 20 day of May, 2015.

  
JUDGE/COMMISSIONER

Presented by:  
LAW OFFICE OF  
DAVID P. HORTON, INC. P.S.

By: 

David P. Horton WSBA#27123  
Attorney for plaintiffs

Copy received; approved as to form:

TOUSLEY BRAIN STEPHENS PLLC

By: \_\_\_\_\_

Christopher I. Brain, WSBA#5054  
Attorney for defendant  
Blue Bay Holdings, LLC

ORDER -2

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## **APPENDIX - B**

FILED  
KITSAP COUNTY CLERK

2016 APR 19 PM 2:54

DAVID W. ROBERTSON

**SUPERIOR COURT OF THE STATE OF WASHINGTON  
FOR KITSAP COUNTY**

ZONNEBLOEM, LLC, a Washington  
limited liability company, MANDL  
HOLDINGS, LLC, a Washington limited  
liability company,

Plaintiffs,

v.

BLUE BAY HOLDINGS, LLC, a  
Washington limited liability company,

Defendant.

No. 13-2-02207-1

**FINDINGS OF FACT AND  
CONCLUSIONS OF LAW**

**THIS MATTER** came on for bench trial before Judge Sally Olsen November 23 through November 25, 2015. Plaintiffs Zonnebloem, LLC and Mandl Holdings, LLC were represented by David Horton of Templeton Horton Weibel, PLLC and Defendant Blue Bay Holdings, LLC was represented by Christopher I. Brain of Tousley Brain Stephens, PLLC. The claims presented at trial for adjudication were Plaintiffs' claims against Defendant to quiet title and Blue Bay Holdings, LLC's counterclaims to quiet title and for prescriptive easements. Blue Bay Holdings, LLC's claims for damages were previously dismissed on summary judgment. After hearing testimony and argument of counsel, and being fully advised, the Court makes the following:

FINDINGS OF FACT AND  
CONCLUSIONS OF LAW

- 1 -

JUDGE SALLY F. OLSEN  
Kitsap County Superior Court  
614 Division Street, MS-24  
Port Orchard, WA 98366  
(360) 337-7140

SUB(84)

## FINDINGS OF FACT

### 1. Parties

A. Zonnebloem, LLC ("Zonnebloem") is owned by Daniel Sluys and Stephanie Richards. Zonnebloem owns two properties at issue in this case. One is a commercial property along Front Street in Poulsbo with store frontage and upper level apartments. It is legally described in Exhibit A ("Zonnebloem Building"). Zonnebloem also owns the property to the northeast of the Zonnebloem Building. It is a parking lot and described in Exhibit B ("Parking Lot").

B. Mandl Holdings, LLC ("Mandl") is owned by Marion Sluys and Loretta Sluys. They are Daniel Sluys parents. Mandl owns a commercial building generally to the south of the Parking Lot.<sup>1</sup> It is legally described in Exhibit C ("Mandl Building").

C. Blue Bay Holdings, LLC ("Blue Bay") is owned by Jim Cecil and Erika Cecil. It owns the commercial real property to the south of the Zonnebloem Building and to the north of the Mandl Building. It is legally described in Exhibit D. ("Blue Bay Building").

### 2. Title and Claims

A. While the form of ownership has changed over the years, an entity controlled by Marion and Loretta Sluys has owned the Mandl Property since 1971.

B. Marion and Loretta Sluys (or an entity they controlled) purchased the Zonnebloem Building and Parking Lot in 2001. It was transferred to Zonnebloem in 2005.

C. Blue Bay purchased the Blue Bay Building in 2012. Prior to Blue Bay's demolition of the former building on the site, a one story building housed

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<sup>1</sup> See Exhibit 2.

various restaurants and other commercial uses on that property for more than 10 years.

D. The parties make conflicting claims to five areas where there are encroachments/conflicts regarding title. Blue Bay also makes claims for prescriptive easements.

E. There are five areas, shown on Exhibit 2, that are encroachments for this Court's resolution. The first area ("Area #1") is a triangle-shaped area.<sup>2</sup> Blue Bay holds record title to Area #1 but it is currently part of the Parking Lot and Zonnebloem claims title to it based on adverse possession and related theories.

F. The second area, ("Area #2") is the top of the stairway that was part of the old building on the Blue Bay Property and is part of the Blue Bay Building. Zonnebloem holds record title to Area #2 but concedes that Blue Bay's predecessor acquired title to this portion of property by adverse possession or some other related theory.<sup>3</sup>

G. The third area ("Area #3") is another triangle-shaped piece of property. Blue Bay holds record title to Area #3. The Mandl Building encroaches on Area #3. Mandl claims Area #3 by adverse possession or related theories.

H. The fourth area ("Area #4") is a hiatus that was created when the area was platted. The plat to the north, Grand View Addition to Poulsbo, of which the Zonnebloem Building, Parking Lot, and Blue Bay Building are a part did not meet the plat to the south, Liberty Bay Addition to Poulsbo, which the Mandl Building is a part. Blue Bay holds record title to this area by virtue of a quitclaim deed. It purchased the property from the heirs of the person who owned the properties before they were platted. Mandl and Zonnebloem claim title to Area #4 by adverse possession or other related theories.

<sup>2</sup> See Exhibit 29.

<sup>3</sup> See Exhibits 27; 28.

- I. The fifth area ("Area #5") is a small triangle of the Parking Lot where the former Blue Bay Building, and current Blue Bay Building encroach. Zonnebloem concedes that Blue Bay's predecessor has acquired Area #5 by adverse possession or related theories.
- J. Blue Bay claims a pedestrian access easement by prescription over the Parking Lot.
- K. Blue Bay claims an easement by prescription for electrical transmission lines over the Zonnebloem and Mandl Properties.
- L. Blue Bay claims an easement by prescription for cable transmission lines over the Zonnebloem and Mandl Properties.

### 3. Area #1

- A. Area #1 has been in title of the Blue Bay parcel for more than 10 years and ever since the Grand View plat was created.
- B. When M. Sluys purchased the Mandl Parcel, the parking lot was in the same configuration since 1971 through its reconfiguration and paving in 2012. Both M. Sluys and D. Sluys testified that they made no changes to the parking lot configuration until 2012 when it was repaved and re-lined.
- C. Prior to 2012, the marked parking spaces in the parking lot were located along the south and north boundaries as illustrated in Exhibit 45. No marked parking spaces were located along the west portion of the Parking Lot. The area was generally covered in grass and unimproved.
- D. All of the historical photos, including from the time in 2002 when M. Sluys acquired the Parking Parcel, show that Area #1 was generally covered in grass. See Exhibits 4, 7, 44 and 45. Although Exhibit 4 illustrates that a car may have hung its rear quarter over a portion of Area #1, there was no other documentary evidence that Area #1 was used for parking.

FINDINGS OF FACT AND  
CONCLUSIONS OF LAW

- 4 -

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- 1 E. Exhibit 46 is an illustration which overlays the Exhibit 2 survey onto  
2 Exhibit 45. The survey very closely approximates the location of the legal  
3 boundary lines onto Exhibit 46.
- 4 F. Exhibit 47 is a tracing in black ink around the same area illustrated by the  
5 survey in Exhibit 46. The survey portion was then removed to show the  
6 relative locations of the boundary to the unimproved portions of the parking  
7 lot.
- 8 G. Exhibit 47 as well as Exhibits 4, 44 and 45 clearly illustrate that the vast  
9 majority of Area #1 was covered by grass and not used for parking.
- 10 H. When the parking lot was reconfigured in 2012, the parking surface was  
11 expanded toward the west and a concrete curb constructed. The concrete  
12 curb is illustrated in Exhibit 12. The expansion of the parking surface to the  
13 west included the painting of parking spaces 12-17 along its west border.  
14 The expansion of the parking surface to the west can be observed by  
15 comparing Exhibits 45 (before) and Exhibit 49 (after).
- 16 I. With respect to the "maintenance" of Area #1, the testimony was that both  
17 the occupants of the Blue Bay Parcel and Zonnebloem and Mandl  
18 occasionally maintained Area #1 as well as other areas along the entire bank  
19 owned in fee by Blue Bay and its predecessors and Mandl. Indeed, Mandl  
20 and Zonnebloem offered testimony that they maintained the bank so they  
21 could access the roof of the old building on the Blue Bay Parcel to work on  
22 the second stories of their buildings.
- 23 J. Zonnebloem has failed to establish by clear and convincing evidence that it  
24 and its processors established an open, hostile, and notorious possession of  
25 Area #1.  
26  
27  
28  
29  
30

FINDINGS OF FACT AND  
CONCLUSIONS OF LAW

- 5 -

JUDGE SALLY F. OLSEN  
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1           **4. Area #3**

- 2           A. In Area #3, the wall of the Mandl Building, space directly adjacent to it, and  
3           a retaining wall, encroach over the surveyed property line.<sup>4</sup>
- 4           B. The evidence showed that Area #3 had been used and maintained by the  
5           Sluys for a long time. Mandl maintained it—including the removal of a  
6           plum tree in Area #3.
- 7           C. In its former configuration a pathway existed from the roof of the Mandl  
8           Building to the Parking Lot. This pathway consisted of a footbridge and was  
9           in Area #3. It went next to the garage on the Mandl property. The bridge  
10          and pathway were maintained by Mandl and its predecessors in excess of  
11          ten years. This area is shown in Exhibits 16, 17, and 54. A portion of  
12          Mandl's new HVAC system is in this area.
- 13          D. Blue Bay presented no testimony to rebut the testimony of Marion Sluys,  
14          Daniel Sluys, Tammy Mattson and Ricky Moon that his areas was used  
15          exclusively by Mandl for over ten years.
- 16          E. Blue Bay has no feasible access to Area #3. It admitted that the Mandl  
17          Building and retaining wall in Area #3 have been adversely possessed.
- 18          F. Mandl has shown by clear and convincing evidence that it and its  
19          predecessors have occupied this area exclusively, openly, notoriously,  
20          continuously under a claim of right for over ten years.

21  
22           **5. Area #4**

- 23          A. Area #4 is a hiatus between the Mandl, Zonnebloem and Blue Bay parcels  
24          that has been treated as Mandl (or Zonnebloem) or their predecessors'  
25          property for over 10 years. The hiatus was created because the two plats that  
26          these properties are part of were started from different section corners and  
27

28  
29           

---

30           <sup>4</sup> See Exhibits 15; 63.

do not meet. The hiatus is approximately 1-foot-wide<sup>5</sup> and almost entirely between the two parcels owned by Zonnebloem and Mandl.<sup>6</sup> The only exception is the area next to Area #3.

B. The plats do not "close." That is, they were originally described inaccurately. To resolve this inaccuracy and to match the location of the buildings to the survey, and previous surveys, Michael Dunphy, a licensed surveyor, created Exhibit 2.

C. Mandl has used this area. It is part of its parking lot to the west of the Mandl Building and has concrete installed by Mandl (or its predecessor) 15 or 20 years ago when it installed a new oil tank under it.

D. Blue Bay presented no testimony to rebut the testimony of Marion Sluys, Daniel Sluys, Tammy Mattson and Ricky Moon that his areas was used exclusively by Mandl for over ten years. Blue Bay admitted that Mandl's improvements in the hiatus belong to Mandl.

E. Mandl has shown by clear and convincing evidence that it and its predecessors have occupied this area exclusively, openly, notoriously, continuously under a claim of right for over ten years.

#### 6. Prescriptive Easement for Power/Cable

A. From prior to 1971, Puget Power ("PSE") electric power reached the Mandl building and old Blue Bay building via a wire from a power pole located outside but within one foot of the Hiatus, as illustrated on Exhibit 2 and Exhibit 37—to a strike on the Mandl building. The PSE power pole is illustrated in Exhibits 14 and 53 as the pole with a red sign. The current pole was installed in 1975. The historic location of the strikes on the Mandl building are illustrated in Exhibits 24 and 25. TV cable was strung along the same route. The power and TV cable to the old Blue Bay building was

<sup>5</sup> See Exhibit 2.

<sup>6</sup> See Exhibit 13.

1 disconnected by its contractor during demolition of the old building. Blue  
2 Bay claims a prescriptive easement for power and cable.

3 B. All witnesses testified that electrical power went from the PSE power pole  
4 to the Mandl building strikes and then to the old building on the Blue Bay  
5 parcel.

6 C. After the power was disconnected during demolition, J. Cecil requested that  
7 PSE be allowed to connect power over this historical route except instead of  
8 running to a strike on the Mandl building, the power to the Blue Bay  
9 building would run directly to a strike on the Blue Bay Building. Such a  
10 change would constitute a very minor shift of the power line and would  
11 eliminate any need for a strike on the Mandl building. This shift to a direct  
12 strike on the Blue Bay building is a reasonable use of the power easement  
13 area.

14 D. PSE required a written easement to re-install power to the new Blue Bay  
15 building. Although M. Sluys exchanged communications with PSE, Mandl  
16 was unwilling to grant the easement unless it had a termination clause. PSE  
17 could not agree to any termination clause because of its commitments to  
18 customers. See Exhibit 59.

19 E. Ultimately, Blue Bay had no option except to have power installed along  
20 Front Street.

21 F. Blue Bay requests that its right to power over the historical route be  
22 confirmed because if Front Street is re-constructed, the Blue Bay Parcel  
23 may lose power.

24 G. Blue Bay has established that it is entitled to a prescriptive easement for  
25 power from the PSE power pole directly to a strike on the Blue Bay  
26 Building.

27 H. With respect to a TV cable, M. Sluys testified he was unaware that cable  
28 also went from the power pole to the old Blue Bay Building. The testimony  
29  
30

FINDINGS OF FACT AND  
CONCLUSIONS OF LAW

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of Eric Waltenburg and Roberto Soltero was that TV cable did service the Blue Bay Parcel.

- I. Blue Bay has established that it is entitled to a prescriptive easement for cable from the pole to the Blue Bay Building.

## 7. Access Easement

A. Blue Bay claims an access easement from the stairway (Area #2) to the public right-of-way to the northwest.

B. Blue Bay's predecessors only parked in the Zonnebloem lot with permission.

C. Blue Bay failed to prove the use was continuous. The two witnesses (that testified by declaration and deposition, by stipulation) testified they used the staircase from 2002 to 2005 and from 2007 to 2012. There was no evidence of use before 2002. The two-year gap between 2005 and 2007 defeats any claim that any prescriptive use was continuous. The Court cannot presume the use prior to 2005 was continuous for a period exceeding ten years. Defendant must prove it. It has not done so by any evidence.

D. The restaurant was not regularly accessed from the parking lot. The use was permissive. Blue Bay paid Zonnebloem to use its dumpster on the Zonnebloem property or occasional use by patrons of the establishments using the old Blue Bay Building.<sup>7</sup> Blue Bay did not produce any evidence of any uniform route. There was never any pathway or walkway serving this staircase. There are many ways someone could access it. This permissive use is consistent with neighborly accommodation or sufferance. Mandl and Zonnebloem's maintenance person would regularly use the roof of the old Blue Bay building to access the sides of the adjacent Mandl and Zonnebloem buildings. The relationship between Zonnebloem and the former tenant of the Blue Bay building was good.

<sup>7</sup> See Exhibits 64 and 65.

1 E. Blue Bay plans to install an American's with Disabilities Act (ADA) entry  
 2 near the stairs (Area #2) to the Parking Lot.<sup>8</sup> But there was no evidence  
 3 presented to show any historical use of that access point. There was never  
 4 any entrance or business sign. Blue Bay has used the Parking Lot to access  
 5 its business, but only since 2014 when construction was complete.

6 F. Blue Bay failed to establish that the use was adverse, and the Court finds  
 7 any use to have been a neighborly accommodation.

#### 8 **8. Propane Easement**

9 A. Blue Bay made claims for a prescriptive easement for a filling a propane  
 10 tank. Other than the fact that there was a tank there, there was no evidence  
 11 that filling of the tank was adverse, no evidence of a regular route, no  
 12 evidence that the use was more than occasional, and no evidence it was  
 13 continuous for over ten years. Further, this claim was not pled. The claim  
 14 was not raised in the Complaint, the Answer, or Counterclaims. It was not  
 15 mentioned or addressed in the Summary Judgment motions filed, or the  
 16 responses thereto.

#### 17 **9. Fences**

18 A. After reconfiguring the Parking Lot in 2012 and after filing this litigation in  
 19 2013, Zonnebloem installed wooden fences blocking access to Area #1 and  
 20 Area #3.

21 B. The portion of the fence blocking access to Area #1 is shown in Exhibits 28,  
 22 29 and 50.

23 C. Zonnebloem installed the fences without Blue Bay's consent or approval.  
 24 Since Blue Bay retains ownership of Area #1, the fence installed on  
 25 portions of Area #1 must be removed.  
 26  
 27  
 28  
 29  
 30

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\* See Exhibit 43.

## CONCLUSIONS OF LAW

1. This Court has jurisdiction over the parties and the subject matter of this action.
2. *Chaplin v. Sanders* states the five elements to an adverse possession claim.<sup>9</sup> The five elements are: (1) actual; (2) open and notorious; (3) hostile (without permission); (4) continuous; and (5) exclusive possession. Under *Chaplin*, the physical manifestations and observations of people using and possessing the property controls. The state of mind of the adverse possessor does not affect the decision to grant adverse possession. Rather, the Court looks at the objective manifestations of the adverse possessor's physical occupation and use of the property.<sup>10</sup>
3. The claim by Zonnebloem for a declaratory judgment that it is entitled to Area #1 by adverse possession is dismissed with prejudice. Zonnebloem shall remove the portion of the fence installed on Area #1.
4. The hiatus area is adjacent to Zonnebloem and Mandl property. It was occupied only by these owners and their predecessors. Blue Bay never had use of this area, nor did its predecessor. Blue Bay obtained this from the heirs of the original owner of the property (from the early 20<sup>th</sup> century) to obtain electric service to their property without requesting permission or obtaining an easement. But the heirs had nothing to convey. When title is obtained by adverse possession, title passes by operation of law once the limitations period passed.<sup>11</sup> Mandl and its predecessors have proven by clear and convincing evidence that its, and its predecessors' use of Areas #3 and #4 was actual, open and notorious, hostile, continuous and exclusive. Title to Areas #3 and #4 shall be quieted in Mandl.
5. Based on the concessions in their Amended Complaint, title to Area #2 and Area #5 shall be quieted in Blue Bay.

<sup>9</sup> *Chaplin v. Sanders*, 100 Wn.2d 853, 857, 676 P.2d 431 (1984).

<sup>10</sup> *Id.* at 862.

<sup>11</sup> *El Cerrito, Inc. v. Ryndak*, 60 Wn.2d 847, 855, 376 P.2d 528 (1962).

FINDINGS OF FACT AND  
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6. Prescriptive rights are not favored.<sup>12</sup> Permissive use may be implied in "any situation where it is reasonable to infer that the use was permitted by neighborly sufferance or acquiescence."<sup>13</sup> Here it is reasonable to infer the use was permitted by neighborly sufferance or acquiescence. "To establish a prescriptive easement, the person claiming the easement must use another person's land for a period of 10 years and show that (1) he or she used the land in an open and notorious manner, (2) the use was continuous or uninterrupted, (3) the use occurred over a uniform route, (4) the use was adverse to the landowner, and (5) the use occurred with the knowledge of such owner at a time when he was able in law to assert and enforce his rights."<sup>14</sup>

7. Blue Bay's claim for a declaratory judgment for a prescriptive easement for pedestrian access over and across the parking lot and Parking Parcel from the stairs to 3<sup>rd</sup> Street is denied. Blue Bay has not established by clear proof that there was anything other than occasional use of the route. It has not proven by that there was a uniform route. It merely showed an access point (the stairs) and speculates as to where someone might go from there. It seeks to put in an ADA access with no proof of any historical regular use. Blue Bays' claim to a prescriptive easement for access fails. It is dismissed with prejudice.

8. Blue Bay's claim for a declaratory judgment for a prescriptive easement for electrical and cable hookup from the PSE power pole to the Blue Bay building is granted.

Dated: This 19 day of April, 2016.

  
JUDGE SALLY F. OLSEN

<sup>12</sup> *Nw. Cities Gas Co. v. W. Fuel Co.*, 13 Wn.2d 75, 83, 123 P.2d 771 (1942).

<sup>13</sup> *Roediger v. Cullen*, 26 Wn.2d 690, 707, 175 P.2d 669 (1946).

<sup>14</sup> *Gamboa v. Clark*, 183 Wn.2d 38, 43, 348 P.3d 1214 (2015) (internal quotations omitted).

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IN THE SUPERIOR COURT OF THE STATE OF WASHINGTON  
IN AND FOR KITSAP COUNTY

ZONNEBLOEM, LLC, a Washington  
limited liability company, MANDL  
HOLDINGS, LLC, a Washington limited  
liability company,

Plaintiffs,  
v.

BLUE BAY HOLDINGS, LLC, a  
Washington limited liability company,

Defendant.

NO. 13 2 02207 1

JUDGMENT QUIETING TITLE AND  
DISMISSING CLAIMS

The Court issued its Findings of Fact and Conclusions of Law on April 19, 2016. Those Findings and Conclusions dealt with four parcels owned by three entities and five portions of those properties, and claims for prescriptive rights, that were subject to this Court's decision. The properties as they existed prior to this Judgment are as follows:

FINDINGS OF FACT & CONCLUSIONS OF LAW-1

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**Properties**

1. Zonnebloem, LLC owns Tax Parcel 4223-000-010-0001 (which has been referred to as the "Zonnebloem Building" that was legally described as follows:

LOT 10, GRAND VIEW ADDITION TO POULSBO, AS RECORDED IN VOLUME 4 OF PLATS, PAGE 45, RECORDS OF KITSAP COUNTY, WASHINGTON.

2. Zonnebloem, LLC also owns Tax Parcel 4223-000-001-0002 (which has been referred to as the "Parking Lot" that was legally described as follows:

THAT PORTION OF LOT 1 GRAND VIEW ADDITION TO POULSBO, AS PER PLAT RECORDED IN VOLUME 4 OF PLATS ON PAGE 45, RECORDS OF KITSAP COUNTY, AND THAT PORTION OF LOT 1 LIBERTY BAY ADDITION TO POULSBO, AS PER PLAT RECORDED IN VOLUME 4 OF PLATS, PAGE 53, RECORDS OF KITSAP COUNTY, WASHINGTON; LYING NORTHERLY OF THE FOLLOWING DESCRIBED LINE: BEGINNING AT A POINT ON NORTHEASTERLY RIGHT-OF-WAY OF FRONT STREET IN THE TOWN OF POULSBO, NORTHWESTERLY (MEASURED ALONG SAID STREET RIGHT-OF-WAY) 65.2 FEET FROM THE SOUTHWESTERLY CORNER OF SAID LOT 1 OF LIBERTY BAY ADDITION TO POULSBO; THENCE NORTHEASTERLY AT RIGHT ANGLES TO SAID NORTHEASTERLY RIGHT-OF-WAY OF FRONT STREET TO THE EAST LINE OF LOT 1 IN GRAND VIEW ADDITION TO POULSBO, BEING THE TERMINUS OF SAID LINE. SITUATE IN KITSAP COUNTY, WASHINGTON.

3. Blue Bay Holdings, LLC owns Tax Parcel 4223-000-001-0101 also referred to as the "Blue Bay Building" that is legally described as follows:

THAT PORTION OF LOT 1, GRAND VIEW ADDITION TO POULSBO, AS PER PLAT RECORDED IN VOLUME 4 OF PLATS ON PAGE 45, RECORDS OF KITSAP COUNTY; AND THAT PORTION OF LOT 1, LIBERTY BAY ADDITION TO POULSBO, AS PER PLAT RECORDED IN VOLUME 4 OF PLATS, PAGE 53, RECORDS OF KITSAP COUNTY, WASHINGTON; LYING WITHIN A TRACT DESCRIBED AS FOLLOWS: BEGINNING AT A POINT ON THE NORTHEASTERLY RIGHT-OF-WAY OF FRONT STREET IN THE TOWN OF POULSBO, NORTHWESTERLY (MEASURED ALONG SAID STREET RIGHT-OF-WAY) 43.2 FEET FROM THE SOUTHWESTERLY CORNER OF LOT 1, LIBERTY BAY ADDITION TO POULSBO; THENCE NORTHWESTERLY ALONG SAID NORTHEASTERLY RIGHT-OF-WAY OF FRONT STREET 22 FEET; THENCE NORTHEASTERLY AT RIGHT ANGLES TO SAID NORTHEASTERLY RIGHT-OF-WAY OF FRONT STREET TO THE EAST LINE OF LOT 1 IN GRAND VIEW ADDITION TO POULSBO; THENCE SOUTH ALONG SAID EAST LINE (AND EXTENSION THEREOF) TO THE NORTH LINE OF LOT 1, LIBERTY BAY ADDITION TO POULSBO; THENCE EASTERLY ALONG SAID NORTH LINE TO THE POINT OF INTERSECTION WITH A LINE DRAWN FROM THE POINT OF BEGINNING, PARALLEL TO THE SOUTH EASTERLY LINE OF LOT 1, LIBERTY BAY ADDITION TO POULSBO; THENCE

FINDINGS OF FACT & CONCLUSIONS OF LAW-2

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SOUTHWESTERLY ALONG SAID LINE TO THE POINT OF BEGINNING. SITUATE IN KITSAP COUNTY, WASHINGTON.

4. MANDL HOLDINGS, LLC owns Tax Parcel 4227-000-001-0008, referred to as the "Mandl Building" that is legally described as:

BEGINNING AT THE SOUTHWEST CORNER OF LOT 1 LIBERTY BAY ADDITION TO POULSBO, ACCORDING TO THE RECORDED PLAT THEREOF, IN SECTION 23 TOWNSHIP 26 NORTH, RANGE 1 EAST, W.M., THENCE NORTHERLY ALONG FRONT STREET 43.2 FEET; THENCE EASTERLY ON A LINE PARALLEL WITH THE SOUTH BOUNDARY LINE OF SAID LOT 1, TO INTERSECTION WITH NORTH BOUNDARY LINE OF SAID LOT 1; THENCE FOLLOWING NORTH, EAST AND SOUTH BOUNDARY LINES OF SAID LOT 1 TO BEGINNING. SITUATE IN KITSAP COUNTY, WASHINGTON.

#### Disputed Areas

The five areas addressed by the Court's Findings and Conclusions are referred to as

Areas 1# through #5. They are described as:

1. Area #1:

THAT PORTION OF LOT 1 OF THE PLAT OF THE GRAND VIEW ADDITION TO POULSBO, AS RECORDED IN VOLUME 4 OF PLATS ON PAGE 45, RECORDS OF KITSAP COUNTY; BEGINNING AT THE WESTERLY MOST POINT OF SAID LOT 1, BEING A POINT ON THE NORTHEASTERLY RIGHT-OF-WAY OF FRONT STREET; THENCE ALONG SAID RIGHT-OF-WAY SOUTH 39°22'27" EAST 28.78 FEET; THENCE LEAVING SAID RIGHT-OF-WAY NORTH 50°37'20" EAST 109.86 FEET TO A POINT ON THE WEST LINE OF LOT 10 OF SAID PLAT AND THE TRUE POINT OF BEGINNING; THENCE ALONG SAID WEST LINE SOUTH 01°59'30" WEST 11.71 FEET; THENCE NORTH 36°04'30" WEST 8.80 FEET; THENCE NORTH 50°37'20" EAST 7.23 FEET TO THE POINT OF BEGINNING.

2. Area #2:

THAT PORTION OF LOT 10 OF THE PLAT OF THE GRAND VIEW ADDITION TO POULSBO, AS RECORDED IN VOLUME 4 OF PLATS ON PAGE 45, RECORDS OF KITSAP COUNTY, DESCRIBED AS FOLLOWS: COMMENCING AT A MONUMENT DESIGNATED "MONUMENT A" AS SHOWN ON THAT SURVEY RECORDED UNDER AUDITOR'S FILE NUMBER 201310030095 AND FILED IN BOOK 78, PAGE 82 OF SURVEYS FROM WHICH A MONUMENT DESIGNATED "MONUMENT B" ON SAID SURVEY BEARS N 33°44'28" W 967.28 FEET; THENCE ALONG THE CENTERLINE OF FRONT STREET N 20°56'37" W 587.92 FEET MORE OR LESS TO A BRASS CAP AS SHOWN ON RECORD OF SURVEY RECORDED UNDER AUDITOR'S FILE NUMBER 200203040281 AND FILED IN BOOK 57, PAGE 79 OF SURVEYS; THENCE LEAVING

FINDINGS OF FACT & CONCLUSIONS OF LAW-3

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SAID CENTERLINE RUN N 59°50'22" E 25.33 FEET MORE OR LESS TO AN ANGLE POINT ON THE EASTERLY MARGIN OF FRONT STREET; THENCE N 39°22'40" W, ALONG SAID EASTERLY MARGIN, 54.68 FEET TO THE SOUTH LINE OF SAID PLAT OF GRAND VIEW ADDITION TO POULSBO AS SHOWN ON THAT CERTAIN RECORD OF SURVEY RECORDED UNDER AUDITOR'S FILE NUMBER 201310030095 AND FILED IN BOOK 78, PAGE 82 OF SURVEYS; THENCE LEAVING SAID EASTERLY MARGIN OF FRONT STREET RUN N 85° 15'33" E 92.20 FEET MORE OR LESS TO THE SOUTHWEST CORNER OF LOT 10 OF THE SAID PLAT OF GRAND VIEW ADDITION TO POULSBO AS SHOWN ON THAT CERTAIN RECORD OF SURVEY RECORDED UNDER AUDITOR'S FILE NUMBER 200203040281 AND FILED IN BOOK 57, PAGE 79 OF SURVEYS; THENCE ALONG THE WEST LINE THEREOF NORTH 01°59'30" EAST 32.20 FEET TO THE TRUE POINT OF BEGINNING; THENCE CONTINUING NORTH 01°59'30" EAST 7.55 FEET; THENCE SOUTH 36°04'30" EAST 6.40 FEET; THENCE SOUTH 59°30'10" WEST 4.68 FEET TO THE TRUE POINT OF BEGINNING.

3. Area #3:

THAT PORTION OF LOT 1 OF THE PLAT OF LIBERTY BAY ADDITION TO POULSBO, RECORDED IN VOLUME 4 OF PLATS, PAGE 53, RECORDS OF KITSAP COUNTY, WA, ACCORDING TO THE SURVEY RECORDED IN VOLUME 13 OF SURVEYS, PAGE 109 (AFN 8001180094) RECORDS OF KITSAP COUNTY; SITUATE IN SECTION 23, TOWNSHIP 26 N., RANGE 1 EAST, W.M., KITSAP COUNTY, WA; DESCRIBED AS FOLLOWS:

BEGINNING AT THE SOUTHWEST CORNER OF LOT 1 OF SAID SURVEY, BEING A POINT ON NORTHEASTERLY RIGHT-OF-WAY OF FRONT STREET IN THE TOWN OF POULSBO, THENCE ALONG SAID RIGHT-OF-WAY NORTHWESTERLY 43.2 FEET TO THE TRUE POINT OF BEGINNING; THENCE CONTINUING ALONG SAID RIGHT-OF-WAY NORTH 39°33'56" WEST 0.40 FEET; THENCE ALONG THE NORTHERLY EDGE OF AN EXISTING BUILDING LINE AND EXTENSION THEREOF NORTH 68°33'53" EAST 79.99 FEET; THENCE LEAVING SAID BUILDING LINE NORTH 32°12'13" WEST 5.76 FEET TO THE NORTH LINE OF LOT 1 OF SAID SURVEY; THENCE ALONG SAID NORTH LINE NORTH 85°19'39" EAST 23.97 FEET; THENCE SOUTH 69°03'30" WEST 101.74 FEET TO THE NORTHEASTERLY RIGHT-OF-WAY OF FRONT STREET AND THE TRUE POINT OF BEGINNING.

4. Area #4 – the Hiatus. Prior to the entry of this order Blue Bay held record title to this parcel.

THAT PORTION OF THE NORTHWEST QUARTER, OF THE NORTHWEST QUARTER, OF SECTION 23, TOWNSHIP 26 N., RANGE 1 EAST, W.M., KITSAP COUNTY, WA; DESCRIBED AS FOLLOWS:

BEGINNING AT THE SOUTHEAST CORNER OF LOT 10 OF THE PLAT OF THE GRAND VIEW ADDITION TO POULSBO, AS RECORDED IN VOLUME 4 OF PLATS, PAGE 45, RECORDS OF KITSAP COUNTY, BEING A POINT ON THE WESTERLY RIGHT-OF-WAY OF THIRD AVENUE NE (PREVIOUSLY GRAND VIEW AVENUE); THENCE SOUTH

FINDINGS OF FACT & CONCLUSIONS OF LAW-4

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01°59'09" WEST 1.10 FEET ON AN EXTENSION OF THE EAST LINE OF SAID LOT 10 TO A POINT ON THE NORTH LINE OF LOT 1 OF THE PLAT OF LIBERTY BAY ADDITION TO POULSBO, RECORDED IN VOLUME 4 OF PLATS, PAGE 53, RECORDS OF KITSAP COUNTY, AND ACCORDING TO THE SURVEY RECORDED IN VOLUME 13 OF SURVEYS, PAGE 109 (AFN 8001180094) RECORDS OF KITSAP COUNTY; THENCE ALONG SAID NORTH LINE SOUTH 85°19'39" WEST 63.45 FEET; THENCE NORTH 32°12'13" WEST 1.15 FEET TO A POINT ON THE SOUTH LINE OF SAID LOT 10; THENCE ALONG SAID SOUTH LINE NORTH 85°15'33" EAST 64.11 FEET TO THE TRUE POINT OF BEGINNING.

5. Area #5:

THAT PORTION OF LOT 10 OF THE PLAT OF THE GRAND VIEW ADDITION TO POULSBO, AS RECORDED IN VOLUME 4 OF PLATS ON PAGE 45, RECORDS OF KITSAP COUNTY; BEGINNING AT THE SOUTHWEST CORNER OF SAID LOT 10; THENCE ALONG THE WEST LINE THEREOF NORTH 01°59'30" EAST 2.13 FEET; THENCE SOUTH 32°12'13" EAST 2.38 FEET TO THE SOUTH LINE OF SAID LOT 10; THENCE ALONG SAID SOUTH LINE SOUTH 85°15'33" WEST 1.35 FEET TO THE TRUE POINT OF BEGINNING. SITUATE IN KITSAP COUNTY, WASHINGTON

**Order**

Based on the Findings and Conclusions the Court ORDERS as follows:

1. Title to Area #1 is quieted in Blue Bay. Plaintiffs' claims to this area are dismissed with prejudice. Plaintiffs are ejected from this area and must remove any improvements, including the fence located in this area, within ten days of the date of this Order.
2. Title to Area #2 and Area #5 are quieted in Blue Bay as against any claim by Zonnebloem.
3. Title to Area #3 and Area #4 are quieted in Mandl as against any claim by Blue Bay
4. Title to a utility easement for electrical and cable transmission lines from the existing utility pole to the Blue Bay Building is quieted in Blue Bay against Zonnebloem Parking Lot and the Mandl Building.
5. Subsequent to the entry of this Order the properties will be legally described as follows:
  - A. Zonnebloem Parking Lot Tax Parcel No. TL 4223-000-010-0001— See Exhibit A
  - B. The Blue Bay Building Tax Parcel 4223-000-001-0101 – See Exhibit A

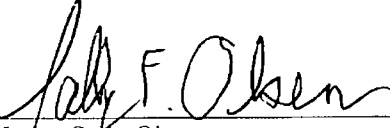
FINDINGS OF FACT & CONCLUSIONS OF LAW-5

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C. The Mandl Building Tax Parcel 4227-000-001-0008 – See Exhibit A

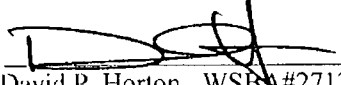
6. The claims by Blue Bay to a prescriptive easement for access, for an American's with Disabilities Act ("ADA") access and for a propane easement are dismissed with prejudice.
7. Because both parties prevailed on significant issues there is no award of fees or costs to either party.
8. All other claims for relief are denied and dismissed with prejudice.

Dated 7/14/16.

  
Judge Sally Olsen

**SALLY F. OLSEN**

Presented by:  
TEMPLETON HORTON WEIBEL PLLC

By:   
David P. Horton, WSBA#27123  
Attorney for Plaintiffs

Copy received; approved as to form:

TOUSLEY BRAIN STEPHENS PLLC

By: \_\_\_\_\_  
Christopher I. Brain, WSBA#5054  
Attorney for defendant  
Blue Bay Holdings, LLC

FINDINGS OF FACT & CONCLUSIONS OF LAW-6

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C. The Mandl Building Tax Parcel 4227-000-001-0008 – See Exhibit A

6. The claims by Blue Bay to a prescriptive easement for access, for an American's with Disabilities Act ("ADA") access and for a propane easement are dismissed with prejudice.
7. Because both parties prevailed on significant issues there is no award of fees or costs to either party.
8. All other claims for relief are denied and dismissed with prejudice.

Dated \_\_\_\_\_.

\_\_\_\_\_  
Judge Sally Olsen

Presented by:  
TEMPLETON HORTON WEIBEL PLLC

By: \_\_\_\_\_  
David P. Horton, WSBA#27123  
Attorney for Plaintiffs

Copy received, *notice & presentation waived.*  
~~approved as to form.~~

TOUSLEY BRAIN STEPHENS PLLC

By: \_\_\_\_\_  
Christopher L. Brain, WSBA#5054  
Attorney for defendant  
Blue Bay Holdings, L-LC

FINDINGS OF FACT & CONCLUSIONS OF LAW-6

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**ZONNEBLOEM****TL 4223-000-010-0001**

That portion of Lot 10 of the Plat of Grand View Addition to Poulsbo, as filed in Volume 4, page 45 of plats, records of Kitsap County, WA, and that portion of the NW Quarter, of the NW Quarter, of Section 23, Township 26 N., Range 1 E., W.M., Kitsap County, Washington, more particularly described as follows:

Commencing at a monument designated "Monument A" as shown on that certain Record of Survey recorded under Auditor's File Number 201310030095 and filed in Book 78, page 82 of surveys from which a monument designated "Monument B" on said survey bears N 33° 44'28" W 967.28 feet; thence N 20° 56'37" W, along the centerline of Front Street. 587.92 feet more or less to a Brass Cap as shown on Record of Survey recorded under Auditor's File Number 200203040281 and filed in Book 57, page 79 of surveys; thence leaving said centerline run N 59°50'22" E 25.33 feet more or less to an angle point on the Easterly margin of Front Street; thence N 39°22'40" W, along said Easterly margin, 54.68 feet to the South line of said Plat of Grand View Addition to Poulsbo as shown on that certain Record of Survey recorded under Auditor's File Number 201310030095 and filed in Book 78, page 82 of surveys; thence leaving said Easterly margin of Front Street run N 85°15'33" E 92.20 feet more or less to the Southwest corner of Lot 10 of the said Plat of Grand View Addition to Poulsbo as shown on that certain Record of Survey recorded under Auditor's File Number 200203040281 and filed in Book 57, page 79 of surveys; thence along said West line N 01°59'30" E 2.13 feet to a point on said West line per Superior Court Case 132022071 and the TRUE POINT OF BEGINNING; thence N 01° 59'30" E along the West line thereof, 30.07 feet to a Superior Court Case 132022071 ordered angle point; thence N 59°30'10" E 4.68 feet; thence N 36°04'30 W 6.40 feet to the West line of said Lot 10; thence continuing along said West line N 01°59'30" E 45.75 feet to the Northwest corner of said Lot 10; thence along the North line thereof S 87°42'15" E 65.00 feet to the Northeast corner of said Lot 10; thence along the East line thereof S 01°59'30" W 77.50 feet to the Southeast corner of said Lot 10; thence continuing along a Superior Court Case 132022071 ordered extension of said West line S 01°59'30" W 1.10 feet to a point on the North line Lot 1 of said Plat of Liberty Bay Addition to Poulsbo; thence along said North line S 85°19'39" W 63.45 feet to the face of an existing building and to a Superior Court Case 132022071 ordered angle point; thence along said building face N 32°12'13" W 3.53 feet to a point on the West line of said Lot 10 and the True Point of Beginning.

SUBJECT TO AN EASEMENT FOR ELECTRICAL AND CABLE TRANSMISSION LINES. SITUATE IN KITSAP COUNTY, WASHINGTON.

Exhibit A – page 2

**MANDL HOLDINGS TRUST**  
**TL 4227-000-001-0008**

That portion of Lot 1 of the Plat of Liberty Bay Addition to Poulsbo, as filed in Volume 4, page 53 of plats, records of Kitsap County, Washington, more particularly described as follows:

Commencing at a monument designated "Monument A" as shown on that certain Record of Survey recorded under Auditor's File Number 201310030095 and filed in Book 78, page 82 of surveys from which a monument designated "Monument B" on said survey bears N 33° 44' 28" W 967.28 feet; thence N 20° 56' 37" W, along the centerline of Front Street, 587.92 feet more or less to a Brass Cap as shown on Record of Survey recorded under Auditor's File Number 200203040281 and filed in Book 57, page 79 of surveys; thence leaving said centerline run N 59° 50' 22" E 25.33 feet more or less to an angle point on the Easterly margin of Front Street and the TRUE POINT OF BEGINNING; thence along said Easterly margin N 39° 22' 40" W 18.89 feet to the Southwest corner of that certain Track of land described in a Statutory Warranty deed recorded under Auditor's File Number 201206130125; thence continuing N 39° 22' 40" W, 0.40 feet more or less to the extension of the North face of that certain building located at 18928 Front Street, Poulsbo, Washington as of the date of this document recording and as depicted on the survey recorded under Auditor's File Number 8001180094 and filed in Book 13, page 109 of Surveys; thence along said North building line and the extension thereof N 68° 33' 53" E 79.99 feet to an angle point as ordered by Superior Court Case 132022071; thence N 32° 12' 13" W 5.76 feet to a point on the North line of said Lot 1; thence along said North line N 85° 19' 39" E 79.21 feet to the Northeast corner of said Lot 1; thence along the East line thereof S 28° 46' 21" E 27.00 feet to the Southeast corner of said Lot 1; thence along the South line thereof S 69° 03' 22" W 152.48 feet to a point on the Easterly margin of Front Street, being the SW corner of said Lot 1; thence along said Easterly margin N 20° 56' 30" W 24.31 feet to the True Point of Beginning.

SUBJECT TO AN EASEMENT FOR ELECTRICAL AND CABLE TRANSMISSION LINES. SITUATE IN KITSAP COUNTY, WASHINGTON.

**BLUE BAY HOLDINGS**  
**TL 4223-000-001-0101**

That portion of Lot 1 of the Plat of Liberty Bay Addition to Poulsbo, as filed in Volume 4, page 53 of plats, and that portion of Lot 10 of the Plat of Grand View Addition to Poulsbo, as filed in Volume 4, page 45 of plats, records of Kitsap County, Washington, situate in Section 23, Township 26 N., Range 1 E., W.M., Kitsap County, Washington, more particularly described as follows:

Commencing at a monument designated "Monument A" as shown on that certain Record of Survey recorded under Auditor's File Number 201310030095 and filed in Book 78, page 82 of surveys from which a monument designated "Monument B" on said survey bears N 33°44'28" W 967.28 feet; thence N 20°56'37" W, along the centerline of Front Street, 587.92 feet more or less to a Brass Cap as shown on Record of Survey recorded under Auditor's File Number 200203040281 and filed in Book 57, page 79 of surveys; thence leaving said centerline N 59°50'22" E 25.33 feet more or less to an angle point on the Easterly margin of Front Street and from which the Southwest corner of Lot 1 of said Plat of Liberty Bay Addition to Poulsbo bears S 20°56'37" E 24.31 feet as shown on the first above mentioned Record of Survey; thence along said Easterly margin of Front Street N 39°22'40" W 19.29 feet to the TRUE POINT OF BEGINNING; thence along said Easterly margin of Front Street N 39°22'40" W 21.60 feet; thence leaving said Easterly margin of Front Street N 50°37'20" E, at right angle to said Easterly margin 109.86 feet, more or less, to a point on the West line of Lot 10 of said Plat of Grand View Addition to Poulsbo; thence along the West line of said Lot 10 S 01°59'330" W 11.71 feet; thence S 36°04'30" E 6.40 feet; thence S 59° 30'10" W 4.68 feet to the West line of said Lot 10; thence along said West line S 01°59'30" W 30.07 feet to the intersection with the face of an existing wall; thence along the face of said wall and extension thereof S 32°12'13" E 9.29 feet to the face of the North wall of an existing building; thence along said North wall and extension thereof S 68°33'53" W 79.99 feet to a point on the Easterly margin of the right-of-way for Front Street and the True Point of Beginning.

TOGETHER WITH AN EASEMENT FOR ELECTRICAL AND CABLE  
 TRANSMISSION LINES. SITUATE IN KITSAP COUNTY, WASHINGTON.

FILED  
COURT OF APPEALS  
DIVISION II

2016 DEC -2 AM 10: 58

STATE OF WASHINGTON

**CERTIFICATE OF SERVICE**

The undersigned declares under penalty of perjury, under the laws  
of the State of Washington, that the following is true and correct: That on  
the 1<sup>ST</sup> day of December, 2016, I arranged for service the foregoing

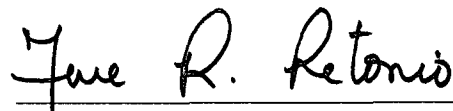
**APPELLANT BLUE BAY HOLDINGS, LLC'S AMENDED**

**OPENING BRIEF** on the following party via U.S. Mail and E-mail:

David P. Horton  
Law Office of David P. Horton, Inc. PS  
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And I caused to be delivered via U.S. Mail for filing with the Court the  
original and one copy of the document to:

Clerk of the Court  
Court of Appeals, Division II  
950 Broadway, Suite 300  
Tacoma, WA 98402



Feve R. Retonio, Legal Assistant

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